

13. NEPA REVIEW

13.1 Introduction

The National Environmental Policy Act (NEPA) of 1969 requires that Federal agencies perform an evaluation of the impact of each proposed major Federal action on the quality of the environment before undertaking the action. The Council on Environmental Quality (CEQ) issued regulations to implement NEPA across the Federal Government (40 CFR Parts 1500-1508). CEQ provides guidance on various aspects of NEPA, including "Forty Most Asked Questions Concerning CEQ's NEPA Regulations," published on March 23, 1981 in 46 FR 18026.

Each Federal agency is responsible for implementing NEPA within the agency. After consulting with CEQ, DOE issued its own regulations for implementing NEPA at 10 CFR Part 1021. For each DOE proposal, a determination must be made whether to apply a categorical exclusion (CX), or to prepare an environmental assessment (EA) or environmental impact statement (EIS).

The *Secretarial Policy on NEPA* of June 1994 re-emphasizes that the NEPA process must be integrated as early as possible with the planning process for all proposals, including real property transfers. The NEPA document, if required, serves as a vehicle for informing the decisionmaker(s) and the public about the environmental issues associated with the proposed action. It identifies the reasonable alternatives analyzed (including the no-action alternative and alternatives outside DOE's jurisdiction) and mitigating measures considered. Also, the NEPA process incorporates opportunities for public participation. The action, in this case the transfer of real property, cannot occur until the successful completion of the NEPA review process.

Within DOE, leases are subject to a NEPA review (see § 13.3.1). Furthermore, transfers of personal property, as well as real property, are subject to NEPA review within DOE (see 61 FR 36228 (1996)).

13.2 Drivers for the Requirement

NEPA requires that Federal agencies assess and document the environmental impact of their proposed actions. The DOE requirements and responsibilities are identified in 10 CFR Part 1021 and DOE Order 451.1, "National Environmental Policy Act Compliance Program." In addition, DOE Policy 430.1 states that land and facility use planning is intended to complement, utilize, link, support, and be fully integrated with NEPA (as well as the many other separate processes required by law and regulation).

13.3 Considering Real Property Use in NEPA Reviews

Determining the level of NEPA review required depends on the potential environmental impacts associated with the proposed use of the property (i.e., the incremental change in impact, if any). Therefore, determine the use (as specifically as possible) of the real property before carrying out a NEPA review. Future use plans for DOE sites are summarized in *Charting the Course: The Future Use Report*. The environmental information gathered about the property (from Chapters 2 to 11) as shown in Exhibit 1-3 should be an integral part of the NEPA document prepared for a proposed real property transfer.

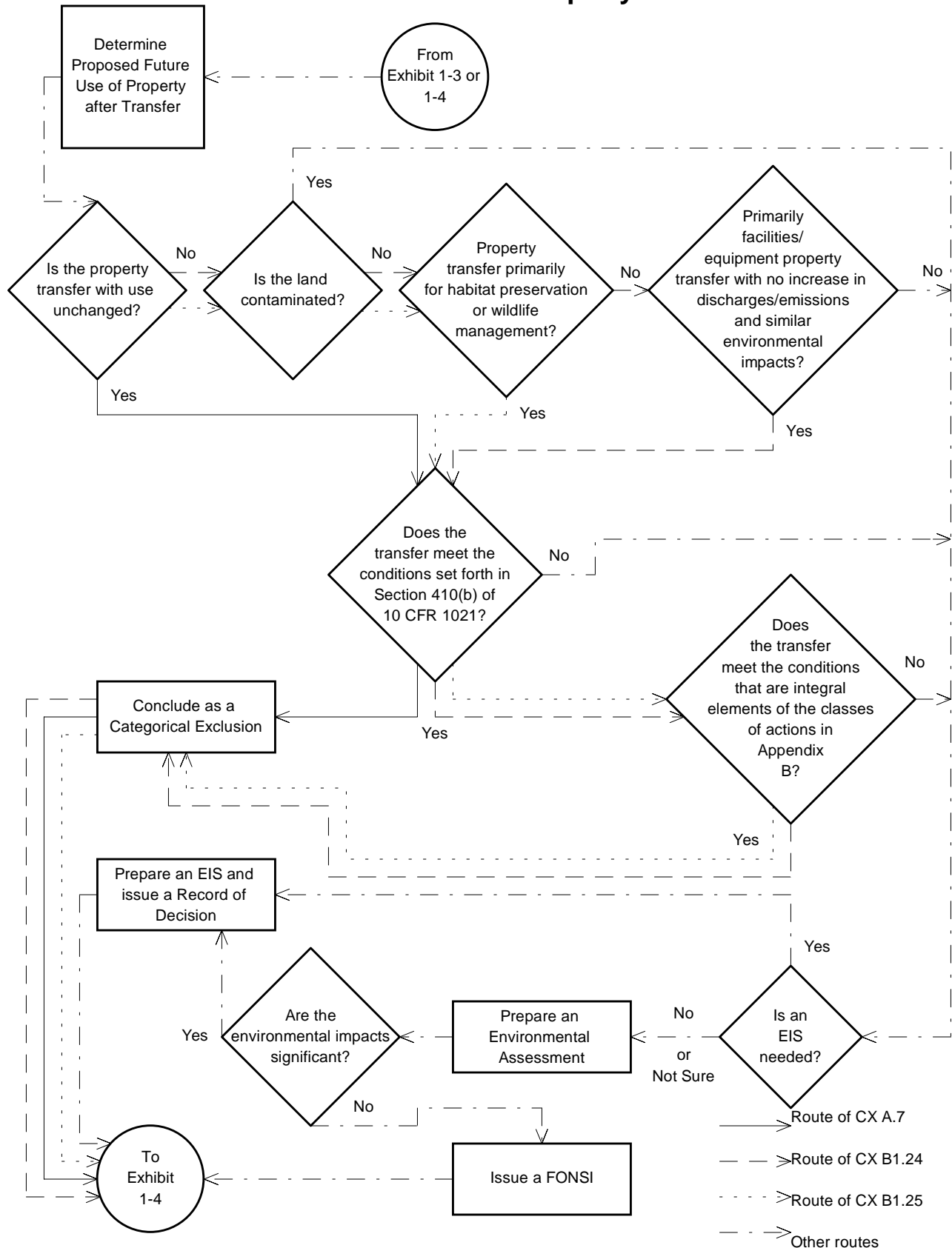
Environmental information should be gathered about the property as early as possible in order to allow adequate time for analysis. A flow chart for the NEPA process for proposed real property transfers appears in Exhibit 13-1.

13.3.1 Real Property Transfers with Use Unchanged

Real property transfers with use unchanged are normally categorically excluded from further NEPA review under Appendix A to Subpart D of 10 CFR Part 1021. Real property transfers are explicitly defined to include leases. "Unchanged" is clarified in 61 FR 36228 as signifying that the "impacts

Exhibit 13-1

NEPA Reviews for Real Property Transfers



would remain essentially the same after the transfer as before." The proposed real property transfer would be categorically excluded provided that all four following conditions [10 CFR 1021.410(b)(2) & (3)] are met:

- (1) There are no extraordinary circumstances related to the proposal (real property transfer) that may affect the significance of the environmental effects of the proposal (see Exhibit 13-1). Examples of extraordinary circumstances include scientific controversy about the environmental effects, uncertain effects or effects involving unique or unknown risks, or unresolved conflicts concerning alternative uses of available resources on the real property.
- (2) The real property transfer is not connected to other actions with potentially significant impacts (see Exhibit 13-1). Actions are connected [40 CFR 1508.25(a)(1)] if they:
 - Automatically trigger other actions that may require EISs,
 - Cannot proceed unless other actions are taken previously or simultaneously, or
 - Are interdependent parts of a larger action and depend on the larger action for their justification.
- (3) The real property transfer is not related to other proposed actions with cumulatively significant impacts (see Exhibit 13-1). {Note that all related proposed actions with cumulatively significant impacts should be discussed together in the same EA or EIS [40 CFR 1508.25(a)(2)]}.
- (4) The real property transfer is not part of a DOE proposed action for which an EIS, programmatic EIS, or Record of Decision (see Exhibit 13-1) is being prepared unless it qualifies as an interim action under 40 CFR 1506.1 and 10 CFR 1021.211.

If a proposed action consisting of a real property transfer with use unchanged does not meet the above conditions, an EA or EIS must be prepared. Consult the NEPA Compliance Officer or subsidiary Field Organization supporting your site in determining whether an EA or EIS should be prepared (see § 13.3.3)

13.3.2 Real Property Transfers with Use Changed

Real property transfers with use changed can qualify for a CX in either of two ways: (1) the environmental impacts of the new use of the property (primarily facilities/equipment) are similar to the DOE use of the property and there are no increases in discharges, emissions or wastes, or (2) the new use of real property, primarily land, is for habitat preservation or wildlife management (see Exhibit 13-1). The former fits into CX classification B1.24 and the latter into CX classification B1.25 under Appendix B to Subpart D to 10 CFR Part 1021. Both CXs B1.24 and B1.25 apply only to uncontaminated facilities and land. Uncontaminated means the lack of "potential for release of substances at a level, or in a form, that would pose a threat to public health or the environment."

CX B1.24 contains two conditions that must be met:

- (1) Although the use of a facility/equipment may change, the environmental impacts of the new, reasonably foreseeable use, after the real property transfer, must be generally similar to the former use.
- (2) There must be no decreases in environmental quality or increases in volumes, concentration, or discharge ratios of wastes, air emissions, or water effluents.

If a judgment cannot be made about the use of this CX without environmental analysis, at least an environmental assessment must be prepared (see Exhibit 13-1).

CX B1.25, which provides for real property transfers primarily of land where the new use is for habitat preservation or wildlife management, does not contain these two conditions because the

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impacts are expected to be favorable to the environment and no discharges are anticipated (see Exhibit 13-1).

In addition, for a real property transfer to qualify for CX B1.24 or CX B1.25, it must meet the same four conditions listed above in § 13.3.1 and must meet the conditions that are integral elements of the classes of actions in Appendix B to Subpart D of 10 CFR Part 1021 (see Exhibit 13-1). One of the conditions that are integral elements of the classes of action in Appendix B is that the real property transfer not adversely affect an environmentally sensitive resource. Environmentally sensitive resources are discussed in Chapters 2 through 5. They include, but are not limited to, floodplains/wetlands, critical habitats, wildlife refuges, wilderness areas, wild and scenic rivers, historic properties, sacred sites, and Native American traditional subsistence use areas.

If the real property transfer with use changed does not fit any of the classes of proposed actions in Subpart D, Appendices A and B or does not meet the integral elements, then an EA or EIS must be prepared (see Exhibit 13-1).

13.3.3 Role of the NEPA Compliance Officer

The NEPA Compliance Officer supporting the site has the authority to make CX determinations (see § 13.6) and to recommend whether an EA or EIS should be prepared. CXs need not be documented [see DOE Order 451.1 § 5(d)(2)]. The NEPA Compliance Officer is also responsible for notifying EH-42 of a determination to prepare an EA or EIS.

13.4 EA Considerations for a Real Property Transfer

The requirements for preparing an EA are found at 40 CFR 1508.9. An EA has three defined functions:

- To provide sufficient evidence and analysis for determining whether the impacts of a proposed action are significant, thus necessitating the preparation of an EIS;
- To comply with NEPA when an EIS is not necessary; and

- To facilitate preparation of an EIS when one is necessary.

The EA is a concise document and usually should not contain long descriptions or detailed data that would be included in an EIS. The EA should consist of a brief discussion of the need for the real property transfer, description of the environment (affected and involved), alternatives to the transfer, the environmental impacts of the proposed transfer, and mitigation measures. In the EA, list the agencies and persons consulted (especially, U.S. Fish and Wildlife Service, state natural resource conservation agencies, State Historic Preservation Officers, and potentially affected Indian Tribes). While there are no page limits, CEQ (see 46 FR 18037) has advised agencies to keep an EA to no more than 10 to 15 pages.

EH-42 has prepared guidance for preparing EAs and EISs (see *Recommendations for the Preparation of Environmental Assessments and Environmental Impact Statements*). In an EA, the focus should be on potentially significant environmental issues and alternatives, and on the discussion of impacts in proportion to their significance (i.e., the sliding scale approach). For example, a discussion of some or all environmentally sensitive resources may be appropriate, including impacts on floodplains/wetlands (§2.4.1), cultural resources and historic properties (§4.5), and threatened and endangered species and their critical habitat (§3.4.1). EH-42 has also produced the *Environmental Assessment Checklist* (Appendix D) to aid in both preparing and reviewing EAs. The checklist consists of two parts:

Examples of EAs Prepared for Real Property Transfers

Two EAs have been prepared and approved for DOE real property transfers: "EA for the Commercialization of the Mound Plant" and "EA for the Commercialization of the Pinellas Plant." Both EAs were prepared in 1994. The proposed form of real property transfer in both EAs was leasing. Besides the proposed action of mixed-use leasing in accordance with the relevant future-use plan, the alternatives of no-action and leasing restricted to existing plant capabilities and uses were considered.

general and supplemental topics. The general topics apply to all EAs, while the supplemental topics apply only to those EAs for which a topic is pertinent. At the conclusion of the EA process, DOE either issues a Finding of No Significant Impact or a Notice of Intent to prepare an EIS.

13.5 Finding of No Significant Impacts (FONSI)

In a FONSI, briefly explain the reasons why the real property transfer will not have a significant effect on the environment and, therefore, why an EIS will not be prepared. Identify which factors were weighted most heavily in this finding.

You must make all EAs and FONSIs available to the public. For additional information concerning requirements for distribution of NEPA documents see 10 CFR 1021.320-322 and EH-42 guidance on public participation, "Effective Public Participation Under NEPA," (December 1994).

13.6 Approvals

Under DOE Order 451.1, Secretarial officers and Heads of Field Organizations approve EAs, FONSIs, and Floodplain Statement of Findings (see § 2.3.3). Under certain conditions, a Head of a Field Organization may re-delegate approval authority to a Head of a subsidiary Field Organization. However, the head of a subsidiary Field Organization may not make further re-delegation. The authority to make CX determinations is allowed by the NEPA Compliance Officer of the field organization [see DOE Order 451.1 § 5(a), (c), and (d)(2)].

13.7 Relationship to EBS

The description of the affected environment of a site in an NEPA document should be consistent with the EBS conclusions and description of the real property proposed for transfer.

There is no need for every detail in the description of the affected environment in an NEPA document to appear in the description of the site conditions in an EBS because the NEPA document and EBS serve different purposes and have different emphases. However, what is important is that the

facts about the site conditions in both documents be congruent. For example, if an NEPA document describes the habitats for several endangered species on the property, the EBS should not say that there are no endangered species in the area.

It is acceptable for an NEPA document to characterize completely the natural environment (flora and fauna) on and around a site but for an EBS to summarily touch on these topics while focusing on the physical conditions (especially with respect to contamination) of a site.

13.8 References

- DOE, 1996. *Charting the Course: The Future Use Report*, DOE/EM-0283, U.S. Department of Energy, Office of Environmental Management, April 1996.
- DOE, 1996. *National Environmental Policy Act Implementing Procedures*, 10 CFR Part 1021, July 1996, as amended December 1996.
- DOE, 1996. *Policy 430.1, Land and Facility Use Planning*, September 1996.
- DOE, 1995. *Order 451.1, National Environmental Policy Program*, September 1995.
- DOE, 1994. *Environmental Assessment Checklist*, U.S. Department of Energy, Office of NEPA Oversight¹, August 1994.
- DOE, 1994. *NEPA Compliance Guide*, Vol. II, U.S. Department of Energy, Office of NEPA Oversight¹, September 1994.
- DOE, 1994. *Effective Public Participation under the National Environmental Policy Act*, U.S. Department of Energy, Office of NEPA Oversight¹, December 1994.
- DOE, 1993. *Recommendations for the Preparation of Environmental Assessments and Environmental Impact Statements*, U.S. Department of Energy, Office of NEPA Oversight¹, May 1993.

¹Renamed Office of NEPA Policy and Assistance.

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CEQ, 1981. *Council on Environmental Quality Questions and Answers on National Environmental Policy Act Regulations ("Forty Most Asked Questions")*, 46 FR 18026, March 1981.

CEQ, 1978, as amended. *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 40 *CFR* Parts 1500-1508.